A

TEO SENG CHIANG

v.

ASIA COMMERCIAL FINANCE (M) BHD

B

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-55-2000]
7 MAY 2008

C ***TORT:*** *Defamation - Libel - Publication of bankruptcy notice - Whether defamatory - Whether publication pursuant to court order - Defence of absolute privilege - Whether proved and made out by defendant - Whether defendant acted with malice - Whether plaintiff ought to be compensated - Protection under s. 14(2) Courts of Judicature Act 1964*

D

The plaintiff had filed an action against the defendant for defamation of a purported wrongful publication of bankruptcy notice by way of substituted service which was, as alleged by the defendant, to have been rightly done by an order of court. The
E defendant had obtained a default judgment in the session's court against the plaintiff for money due and owing pursuant to a hire purchase agreement, which was later set aside for irregularities. The plaintiff contended that there was no business dealing with the defendant and the hire purchase agreement was a bogus
F agreement created by the defendant for their own purpose. The plaintiff filed his defence and counterclaim claiming that he was harassed and subjected to emotional stress and humiliation by alleged fraud and negligence by the defendant and claimed damages against the defendant. Both parties had later on
G withdrew their actions in the session's court with respective costs awarded to the plaintiff. The defamation suit was filed because on two occasions *ie*, on 24 May 1999 and 26 May 1999 respectively, the defendant had published an advertisement in the newspaper purporting to have effected substituted service of the bankruptcy
H notice issued against the plaintiff and the plaintiff felt that, as a consequence of these publications, it had greatly and seriously injured his character, credit and reputation and had also caused emotional distress. The defendant stood with the notion that the publication in the newspaper was made on the basis of absolute
I privilege at common law and this privilege would not be defeated or affected even if there was malice or *mala fide* towards the plaintiff. Further, the defendant had also noted that there was

protection under s. 14(2) of the Courts of Judicature Act 1964 ('CJA') which legalised their act to execute the order for publication and this was done with compliance of the said section. The central question here would be whether: (i) the defendant deserved protection simply because they somehow managed to obtain an order for publication or (ii) the court should have declined protection because the bankruptcy notice was based on a bogus debt.

Held (dismissing the plaintiff's claim with costs):

(1) The complaint made by the plaintiff arose as a consequence of the default judgment, whereby the plaintiff had agreed to settle the matter and also agreed not to pursue with the counterclaim. The plaintiff in the session's court had also received costs and this was sufficient to raise the doctrine of estoppel. Further, the plaintiff ought not to be allowed to pursue this action when the matter relating to this action could have been ventilated in the session's court but the plaintiff chose not to do so. (para 7)

(2) The defendant had advertised the bankruptcy notice according to law and pursuant to a court order, and had also relied on the case of *Wong Cham Mew v. Hong Leong Finance Bhd* where it was held that the publication of a notice of substituted service was made pursuant to a court order and therefore it was an absolute privilege. (para 7)

(2a) Though the defendant's argument had merits, the case of *Wong Cham Mew (supra)* or s. 14(2) CJA would not have exonerated the defendant if the publication was made fraudulently or with premeditated intention to injure etc. the plaintiff. The pleadings were silent on this issue and even if it had been pleaded, it must be proved according to law. Both were not done in this case. (para 7)

[Order accordingly.]

Case(s) referred to:
Addis v. Crocker [1960] 1 QB 87 ***(refd)***
Bottomley v. Brougham [1908] 1 KB 584 ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Coopers & Lybrand v. Singapore Society of Accountants & Ors [1988] 1 LNS 60 HC ***(refd)***
Dawkins v. Lord Rokeby [1874-80] All ER Rep 994 ***(refd)***

A *Kian Lup Construction v. HongKong Bank Malaysia Bhd [2002] 7 CLJ 32 HC* ***(refd)***
Lau Khan Siew v. Guiness Anchor Marketing Sdn Bhd [2000] 1 LNS 353 HC ***(refd)***
Lincoln v. Daniels [1961] 3 All ER 740 ***(refd)***
B *Marrinan v. Vibart [1963] 1 QB 528* ***(refd)***
Munster v. Lamb (1882-83) LR 11 QBD 588 ***(refd)***
Niranjan Dolly K v. Toh Laye Lan (Zhuo Lilan) [2003] 1 SLR 612 ***(refd)***
Roy v. Prior [1971] AC 470 ***(refd)***
Soh Chun Seng v. CTOS-EMR Sdn Bhd [2004] 5 CLJ 46 HC ***(refd)***
Wong Cham Mew v. Hong Leong Finance Bhd [1998] 1 LNS 58 HC ***(refd)***
C

Legislation referred to:
Courts of Judicature Act 1964, s. 14(2)
Defamation Act 1957, ss. 11, 12

Other source(s) referred to:
D *Halsbury Laws of England,* 4th edn, paras. 95, 98, 100
Gatley on Libel and Slander, 10th edn, paras 13.1, 13.5, 13.6, 13.16

For the plaintiff - Chew Peng Hui; M/s Battenberg & Talma
For the defendant - Lawrence Ngu; Ms Tang & Partners

E *Reported by Kumitha Abdul Majid*

JUDGMENT

F **Hamid Sultan Abu Backer JC:**

[1] This is my judgment in respect of the plaintiff's action against the defendants for defamation of a purported wrongful publication of bankruptcy notice by way of substituted service which was as
G the defendant says, rightly done, that too by an order of court.

Brief Facts

[2] In this case, the defendants had obtained a default judgment on 4 September 1998 in the session's court against the plaintiff
H for money due and owing pursuant to a purported hire purchase agreement. The plaintiff says he did not have any business dealing with the defendant whatsoever and the hire purchase agreement is a bogus agreement created by the defendant or its servants for their own purpose. Before the filing of this suit, I am informed by
I both counsels (see encl. 135 and 136 – Chronology) that the

plaintiff had filed an application to set aside the default judgment and the default judgment was set aside for irregularities on 21 February 2000. On 29 February 2000, the plaintiff in this case had filed his defence and counterclaim in the session's court. In the counterclaim, the plaintiff had also claimed that he was harassed and subjected to emotional stress and humiliation by alleged fraud and negligence on the part of the defendant in the defendant's action and bankruptcy notice and claimed damages against the defendant. On 7 June 2000, the plaintiff had initiated this action in the High Court. Further, on 24 March 2004, both parties in the Session's Court had withdrawn their actions with respective costs awarded to the plaintiff. On 30 May 2005, the session's court allowed taxed costs of RM10,665 in favour of the plaintiff against the defendant. All these facts were not disclosed in the statement of claim of the plaintiff's notwithstanding that the statement of claim was amended on 23 January 2008 just a few months before the trial of this action. The amended statement of claim reads as follows:

1. At all material times the plaintiff is a businessman carrying on business under the name of SENG KIAT COMPANY as a cigarettes stockist for LANCO SUPPLIES SENDIRIAN BERHAD, the distributor of MTC MARKETING SENDIRIAN BERHAD of Lot 1329, Jalan Mersaw, Pending Industrial Estate, P.O. Box 2116, 93742, 93450 Kuching, Sarawak. At all material times the plaintiff resided and is residing at No.23, Jalan Repok, 96100 Sarikei.

2. The plaintiff has no dealing whatsoever with the defendant at all material times.

3. On 2 occasions on 24.5.1999 and 26.5.1999 the defendant published or caused to be published falsely and maliciously of the plaintiff through their solicitors/lawyers or agent, Messrs. Tang & Partners, Advocates an advertisement in the 24.5.1999 and 26.5.1999 issues of the Sin Chew Jit Poh purporting to effect substituted service of a bankruptcy notice issued against the plaintiff. The said two advertisements were identical and read as follows:

A

Malaysia
In the High Court of Sabah and Sarawak
At Sibu
In the Bankruptcy Proceeding ~~No. 29-204-99~~
No. 29-208-99

B

Re: Teo Seng Chiang @
Teo Seng Chieng – Debtor
(BIC.K. 150220)
No. 15, 1st Floor, Jalan Maju
96000 Sibu, Sarawak

C

Ex-Parte: Asia Commercial Finance (M)
Berhad
(Company No. 6521-U)
No. 3, Raminway
96000 Sibu, Sarawak – Creditor

D

Substituted Service Of
Bankruptcy Notice

In the matter of a Bankruptcy Notice issued on the 12th day of April, 1999

E

To: Teo Seng Chiang @ Teo Seng Chieng
(BIC.K. 150220)
No. 15, 1st Floor, Jalan Maju
96000 Sibu, Sarawak

F

Take Notice that a Bankruptcy Notice has been issued against you in this Court by Asia Commercial Finance (M) Berhad (Co. No. 6521-U) of No. 3, Raminway, 96000 Notice be served on you by publication of this Notice in one (1) issue of "SIN CHEW JIT POH (M)" and that such publication shall be deemed to be

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good and sufficient service of the said Bankruptcy Notice upon you excluding the day of this publication and the costs of this application shall be costs in the cause.

The Bankruptcy Notice can be inspected by you on

H

application at this Court.

Dated this 27th day of April, 1999

By the Court
(Sgd) Allauddin bin Mohd Tahir
...
Senior Assistant Registrar
High Court, Sibu

I

Substituted Service of Bankruptcy Notice is taken out by M/S Tang & Partners Advocates, for and on behalf of the Creditor whose address for service is at No.7, 2nd Floor, Jalan Wong Nai Siong, 96000 Sibu, Sarawak.

4. The words in the said advertisements in their plain and ordinary meaning meant and were understood to mean:

(i) the plaintiff is unable to settle his debt with the defendant;

(ii) the plaintiff is insolvent;

(iii) the plaintiff has been evading service of the said bankruptcy notice;

(iv) the plaintiff is a businessman in financial trouble;

(v) the plaintiff is not a creditworthy or trust-worthy businessman; and

(vi) the plaintiff has absconded or has gone into hiding because of his financial problems.

5. The plaintiff has in consequence of the said publications been greatly and seriously injured in his character, credit and reputation and in the way of his business and has been brought into public scandal, odium and contempt. The plaintiff has also been greatly and emotionally distressed.

6. By letter dated 3rd of June, 1999 issued by the plaintiff's solicitors, Messrs. Battenberg & Talma, Advocates, Sibu, the plaintiff informed the defendant that he never had any dealing with the defendant and that they had no basis for issuing a bankruptcy notice against him, and seeking a retraction and clarification of the said publications and suitable offer of amends.

7. By letter of their solicitors, Messrs. S.B. Lee & S.K. Ling Advocates dated the 29th of June, 1999 the defendant instead threatened the plaintiff with legal action for writing his aforementioned letter.

And the plaintiff claims against the defendant for:

iii. general damages to be assessed by the Court;

ii. aggravated or exemplary damages;

iv. such other reliefs and remedies as the court may deem fit to grant;

A iv. an injunction restraining the defendant, whether by themselves, their agent or servants or otherwise however from publishing the said libel or any other words to similar effect;

v. costs.

B

[3] The defendants say that the publications complained of by the plaintiff were incapable of giving rise to any cause of action by the plaintiff against the defendants for defamation in this action for the following reasons:

C

(i) the publication in the newspaper concerned was made on an occasion of absolute privilege at common law;

(ii) any irregularity as alleged by the publication of the said Notice of Substituted Service of Bankruptcy Notice in two (2) issues
D of the newspaper concerned instead of one due to the typographical error of the publisher concerned will not remove the privilege or prevent the occasion of publication as being that of an absolute privilege at common law in the circumstances;

E

(iii) the occasion of an absolute privilege at common law is not defeated or affected even if there was malice or *mala fide* which the plaintiff was attempting to show by his evidence (and which the defendant will contend that the plaintiff has
F failed to prove);

(iv) if the occasion was not that of an absolute privilege at common law, the defendant could not have published or caused to be published in the newspaper concerned the
G advertisement of such notice with the typographical error;

(v) the defendant are protected under s. 14(2) of the Courts of Judicature Act 1964; and

(vi) the notice of bankruptcy for the substituted service as
H published and complained of by the plaintiff is incapable of bearing any defamatory meaning alleged by the plaintiff in para. 3 of the statement of claim or any defamatory meaning in law.

[4] The plaintiff says: (i) the defendant is not relying on ss. 11
I and 12 of the Defamation Act 1957. The two publications are admitted; (ii) the publication on 24 May 1999 is not protected because it was not pursuant to court order; (iii) the publication

on 26 May 1999 is not within the ambit of an absolute privilege or the recognised extensions of the privilege; (iv) that the publication on 26 May 1999, if ostensibly or *prima facie* within the ambit of an absolute privilege, such privilege should be denied in the circumstances of this case.

And says that the central question here is that whether: (i) the defendant deserves protection simply because they somehow managed to obtain an order for publication; or (ii) the court should decline protection because the bankruptcy notice is based on a bogus debt; plaintiff's debt is created by a bogus hire purchase agreement using stolen identity and name of plaintiff; his liability under the default judgment was obtained by a dubious service of process and the attempted service of the bankruptcy notice were done at a bogus address – in short fabrication of document and evidence and abuse of process by the defendant or their servants and employees and agents.

And the plaintiff asserts in principle and as a matter of public policy that the plaintiff is entitled to his remedy. ie, *ubi jus ibi remedium* – and that "the predominant requirement of public policy" must prevail in this case.

Further the plaintiff says that the publications are not protected by qualified privilege at common law because they are not reports of judicial proceedings.

Defendant's Argument

[5] The defendants say that the plaintiff's action for defamation is unsustainable and ought to be dismissed with costs and advances three grounds. They can be briefly summarised as follows:

First Ground

The publication of the notice of substituted service of a bankruptcy notice was ordered, directed and/or authorised by and done in compliance with the court order. It was done in the course of the judicial proceedings, it being a step as ordered by the court in that proceeding for effecting service of the bankruptcy notice on the plaintiff. It was brought into being for the purpose of, in relation and with reference to that bankruptcy proceeding. The publication complained of by the plaintiff was made on an occasion of absolute privilege at common law and incapable of

giving rise to any cause of action by the plaintiff against the defendant. It falls under the second category of absolute privilege ie, "everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceeding" and relies on the case of *Lincoln v. Daniels* [1961] 3 All ER 740. The defendant asserts that it is not correct that the second category of the absolute privilege attached only to statements relating to evidence given or to be given as evidence in the course of judicial proceedings and relies on the following authorities namely: (i) *Lincoln v. Daniels* [1961] 3 All ER 740, (ii) *Wong Cham Mew v. Hong Leong Finance Bhd* [1998] 1 LNS 58, (iii) *Halsbury Laws of England,* 4th edn. para. 98 and 100, (iv) *Gatley on Libel and Slander*, 10th edn., para. 13.1, 13.5, 13.6 and 13.16, (v) *Coopers & Lybrand v. Singapore Society of Accountants & Ors* [1988] 1 LNS 60, (vi) *Niranjan Dolly K. v. Toh Laye Lan (Zhuo Lilan)* [2003] 1 SLR 612, (vii) *Bottomley v. Brougham* [1908] 1 KB 584, (viii) *Dawkins v. Lord Rokeby* [1874-80] All ER Rep. 994. Further the defendants say, under the English common law, when the occasion for publication was absolutely privileged, no action for defamation lies whether or not a defendant was actuated by malice and relies on the following authorities namely: (i) *Halsbury Laws of England,* 4th edn. para. 95, (ii) *Munster v. Lamb* (1882-83) LR 11 QBD 588. In addition, the defendant says that mere irregularity in proceedings or any incidental documents will not remove the privilege and relies on the case of *Addis v. Crocker* [1960] 1 QB 87. The defendants further add that the two publications of the notice of substituted service due to typographical errors of publisher which the defendant cannot be responsible for, is mere irregularity which does not remove the privilege and asserts that cases relied on by the plaintiff to say that the occasion was not covered by absolute privilege are mostly cases on action for wrongful seizure in execution and malicious prosecution and/or concerning extent of the third category of the absolute privilege. *Lincoln v. Daniels,* therefore have no bearing on the instant case, which is action by the plaintiff for defamation. Further the defendants say that *Marrinan v. Vibart* [1963] 1 QB 528 decided that the defence of absolute privilege in a defamation suit should not be allowed to be side-stepped by a different cause of action like the tort of conspiracy brought to claim damages for injury to reputation and asserts that it is no authority, to assimilate the tort

of conspiracy to injure, misfeasance of public duty, malicious falsehood, malicious prosecution or abuse of the process of the court with the tort of defamation.

Second Ground

The second ground of the defendants' submission is based on s. 14(2) of the CJA 1964 which provides:

> (2) No officer of any court or other person bound to execute the lawful warrants or orders of any judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

and says that the defendant falls within the definition of "other person" which s. 14(2) was enacted to protect. Further the defendants assert that the words "other person" are plain and confined to judicial officer and the headings of the section should not be used to limit the meaning.

Third Ground

On the third ground, the defendants say that the advertisement of the notice of the substituted service complained of by the plaintiff is incapable of bearing any defamatory meaning alleged by the plaintiff in para. 3 of the statement of claim or any defamatory meaning in law because advertisement for the substituted service published as ordered by the court and addressed to the plaintiff merely informed that it is a substituted service of a bankruptcy notice issued in Bankruptcy Proceeding No. 29-204-99 in the High Court of Sibu, the publication shall be deemed good and sufficient service and that the bankruptcy notice concerned can be inspected by the plaintiff on application at the court.

The defendants say that any ordinary, reasonable and fair-minded person who reads the whole of the advertisement concerned would not discern the meaning as alleged by the plaintiff and relies on the following cases namely: (i) *Soh Chun Seng v. CTOS-EMR Sdn. Bhd.* [2004] 5 CLJ 46, (ii) *Lau Khan Siew v. Guiness Anchor Marketing Sdn. Bhd.* [2000] 1 LNS 353, (iii) *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, (iv) *Kian Lup Construction v. HongKong Bank Malaysia Bhd* [2002] 7 CLJ 32.

[6] In reply to the defendants' submission, the plaintiff says absolute privilege has never been applied to publication of documents outside the court because of ease of abuse and relies on the cases of *Roy v. Prior* [1971] AC 470; [1970] 2 All ER 729. Further, the plaintiff says that the application for substituted service of bankruptcy notice is not a judicial proceeding contemplated by absolute privilege and relies on the *dicta* of Lord Wiberforce in *Roy*'s case, and says the case of *Wong Cham Mew* case does not establish a binding ratio. In addition, the plaintiff says that s. 14(2) is not available because (i) defendants are not "any person bound to execute" the order for publication because they have not been appointed to do so and the order is permissive; (ii) section is confined to execution proceedings (iii) "any person" means a natural person (iv) publications done by Sin Chew and DWI said 24th publication could not be said to be published or caused to be published by the defendant. Further the plaintiff says points of law need not be pleaded but s. 14(2) is a statutory defence; defendants by not pleading intended to take the plaintiff by surprise and say that amendment to include s. 14(2) must still be made.

[7] I have heard the evidence, read all documents filed in court and the submission of parties in detail. I do not propose to deal with the law relating to defamation in this case as I have adequately dealt with the same in the case of *Chew Peng Cheng. v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418, High Court of Sibu Case No: CS-22-57-1998. The point which requires consideration is that which has been raised by the defendants and has merits. I take the view that the plaintiff's claim must be dismissed. My reasons are as follows:

(i) The very act the plaintiff complains of arises in consequence of a default judgment. The plaintiff had agreed to settle the matter and has agreed not to pursue the counterclaim. The plaintiff in the session's court has also received costs. I take the view that this is sufficient to raise the doctrine of estoppel. Further, there must be also finality to litigation. The plaintiff ought not to be allowed to pursue this action when the matter relating to this action could have been ventilated in the session's court but the plaintiff chose not to do so.

(ii) Even if I am wrong in stating the above, I take the view that the defendants have according to law and pursuant to court order advertised the bankruptcy notice. The defendants have relied on the case of *Wong Cham Mew*, case, where it was held that the publication of a notice of substituted service was made pursuant to a court order and therefore it was an absolute privilege. Further, the defendants had relied on the defence of s. 14(2) of the CJA 1964. To this, I will say that though the defendants' argument has merits, *Wong Cham Mew* case or s. 14(2) CJA 1964, will not exonerate the defendants if the publication was made fraudulently or with premeditated intention to injure etc the plaintiff. In this case, the pleadings are silent on this issue and even if pleaded must be proved according to law. In this case both were not done.

[8] For reasons stated above, I dismiss the plaintiff's claim with costs. The getting up fees shall not exceed RM50,000. If costs cannot be agreed the defendants are at liberty to tax costs.

I hereby order so.